STATE OF MICHIGAN

COURT OF APPEALS

TITI HANNAH EKEMA, a/k/a TITI HANNA EKEMA, Plaintiff-Appellant, v SAMSON TOH ATANCHI, Defendant-Appellee.	UNPUBLISHED March 20, 2008 No. 278455 Oakland Circuit Court Family Division LC No. 04-689113-DP

Before: Servitto, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order denying her motion to change the domicile of the parties' minor child, Darell Toh Atanchi, from Michigan to Maryland and transferring sole physical custody of Darell from plaintiff to defendant. We affirm.

The trial court ordered the parties to share joint legal custody; formerly, plaintiff had sole legal and physical custody of Darell. On appeal, plaintiff argues that the trial court's decision to deny her motion to change Darrell's domicile and grant defendant sole physical custody was against the great weight of the evidence. We disagree.

All child custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *Mixon v Mixon*, 237 Mich App 159, 162; 602 NW2d 406 (1999). A finding of fact is not against the great weight of the evidence unless the evidence clearly preponderates in the opposite direction. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

In deciding a change of domicile motion, the trial court must consider the *D'Onofrio*[1] factors, which are codified in MCL 722.31(4), before permitting a change of domicile:

[1] *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A 2d 27 (1976).

(a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.

(b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.

(c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.

(d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.

(e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child. [MCL 722.31(4); See also *Rittershaus v Rittershaus*, 273 Mich App 462, 465; 730 NW2d 262 (2007) (observing that the legislature codified the *D'Onofrio* factors in MCL 722.31(4)).]

With respect to MCL 722.31(4)(a), the trial court found that plaintiff's salary increased $3,600, she had the potential to earn more in commissions and bonuses, and her work schedule was more flexible. The trial court also found that plaintiff had family and friends in Maryland. After discussing defendant's salary, defendant's living situation, and the academic improvements Darell has made while living with defendant, the trial court concluded:

> Based on the testimony and evidence, I am not persuaded that the residence change has the capacity to improve the quality of life for *both* Plaintiff and Darell, with Darell as my primary focus. I do not find that the move to Maryland would benefit Darell; but rather, would be a set-back for him. He is thriving in Defendant's home and in the Southfield School District. His behavior is under control, he has a set routine that he follows every day, and he has adjusted exceedingly well to living with Defendant on a full-time basis. He has made friends in school and enjoys going and participating every day.
>
> Plaintiff, although making a little more money, is still on the same afternoon shift that she worked in Michigan. I see no compelling benefit to Darell to approve the move to Maryland at this time.

Plaintiff argues that her increased salary, flexible schedule and family and friends in Maryland benefit both her and Darell. The trial court acknowledged plaintiff's higher salary, flexible schedule and proximity to family and friends in its factual findings, and clearly considered these changes. Nevertheless, the trial court concluded that Darell's interests would be better served by remaining with his father in Michigan. As the trial court noted, Darell is

succeeding in school, where he is in an autistic classroom, and he has a regimented routine in his father's home. This evidence supports the trial court's conclusion that there is no compelling benefit to Darell by allowing the change of domicile, and the trial court's findings of fact are not against the great weight of the evidence.

Regarding the second factor, MCL 722.31(4)(b), the trial court found that the parties had numerous conflicts over parenting time and noted plaintiff's opinion that defendant is incapable of providing for Darell's emotional needs. The trial court found:

> Clearly there has been a good deal of animosity between the parties. The communication between the parties has failed and I have no doubt that parenting time complaints have been by both Plaintiff and Defendant. I am not convinced that Plaintiff's motivation behind move [sic] to Maryland is *not* motivated in part by her desire to frustrate Defendant's parenting time. Plaintiff's dislike of Defendant is clear and because of the level of improvement in Plaintiff's employment from Michigan to Maryland is minimal overall, I do not doubt that part of Plaintiff's reasoning for the move was to distance herself, and hence Darell, from Defendant.

On appeal, plaintiff argues that defendant did not use all of the parenting time he was allotted and did not ever participate in after school activities or attend parent/teacher conferences. The trial court heard and considered plaintiff's testimony, but it also considered defendant's testimony that plaintiff had been uncooperative and unwilling to facilitate his parenting time. Because the evidence supports the trial court's findings that animosity exists between the parties, that neither party has complied with the parenting order, and that plaintiff vehemently dislikes defendant, the trial court's findings are not against the great weight of the evidence.

The third factor, MCL 722.31(4)(c), requires the trial court to determine, if it granted the change of domicile, whether it could modify the parenting time schedule to preserve and foster the relationship between the child and the non-custodial parent. The trial court must also consider whether the parents are likely to comply with the modified parenting schedule. MCL 722.31(4)(d). Here, the trial court found: "[t]he amount of parenting time proposed by Plaintiff is fairly reasonable; however, my focus, considering Darell's autism and special needs, is also on his stability and continuity." Plaintiff contends that the parenting time schedule she proposed was generous, and the trial court discounted the fact that Darell had the longest period of stability and continuity with plaintiff. Although it is true that plaintiff's proposed parenting schedule was generous and Darell primarily lived with plaintiff for most of his life, the trial court gave more weight to the stability of Darell's current living situation with defendant. This finding is not against the great weight of the evidence. The testimony presented showed that Darell is thriving in defendant's custody. Defendant has provided a stable, safe and caring home life for Darell and is catering to his academic needs. The evidence presented also showed that plaintiff had a difficult time adhering to the court ordered parenting time schedule. Based on these facts, the evidence supports the trial court's findings, and no error occurred.

Factor four, MCL 722.31(4)(d), instructs the trial court to consider whether the parent opposing the change of domicile is "motivated by a desire to secure a financial advantage with respect to a support obligation." The trial court made the following findings on this factor:

> Plaintiff is convinced that Defendant is opposing the move and seeking custody of Darell in order to stop paying child support. Defendant is currently under order to pay child support in the amount of $804 per month. Defendant's child support has been current and he does not have a history of petitioning to modify or reduce his child support. I have no reason to find that Defendant is opposing the move to gain an advantage when it comes to child support.

Plaintiff argues that defendant is attempting to capitalize on her move by seeking custody and, thereby, eliminate his child support obligation. Plaintiff claims that defendant hates paying child support and has made this clear on numerous occasions to mutual friends. Nonetheless, plaintiff did not present testimony at the evidentiary hearing to support her assertion on appeal that defendant resents paying child support. The only testimony presented on the child support issue was from the FOC evaluator, who stated that she had no reason to believe that defendant's opposition to plaintiff's motion was motivated by financial reasons. This evidence, and the fact that defendant was always current on his child support obligation, supports the trial court's findings.

Plaintiff concedes that domestic violence, the fifth factor, MCL 722.31(4)(e), was not an issue in this case.

In sum, the evidence supports the trial court's factual findings. Plaintiff's arguments are premised on her belief that the trial court should have weighed the evidence somewhat differently, i.e., in her favor. Nonetheless, the evidence does not clearly preponderate in the opposite direction of the trial court's factual findings; consequently, we affirm the trial court's factual findings on appeal.

Next, plaintiff challenges the trial court's factual findings on best interests factors (a), (b), (d), (e), (f), (h), (i), (j), and (l) of MCL 722.23. We will address each factor in turn.

MCL 722.23(a) requires the trial court to assess the love, affection and other emotional ties existing between the parties and the child. The trial court found the parties to be equal on this factor. Plaintiff argues on appeal that she has stronger emotional ties with Darell because she was Darell's primary caregiver from infancy to age five. The trial court acknowledged plaintiff's status as Darell's custodial parent but also relied on evidence that defendant exercised his parenting time and has an emotional relationship with Darell. Given that both parties have emotional ties with Darell, even though plaintiff had a greater opportunity to develop such ties, the trial court's finding on this factor is not against the great weight of the evidence.

MCL 722.23(b) instructs the trial court to consider "[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." In this case, the trial court found that both parties could provide for Darell's educational and religious needs. The trial court decided, however, that the factor slightly favored defendant because it would not be in "Darell's best interest to disrupt his continuity and stability here in Michigan." The trial court's finding is not against the great weight of the evidence. Defendant is in the best position to continue Darell's education in Southfield, where Darell is excelling in an autistic classroom.

Next, plaintiff challenges the trial court findings on factor (d), MCL 722.23(d), the length of time the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity. Plaintiff argues that the trial court failed to consider evidence that plaintiff provided a stable environment for Darell in both Maryland and Michigan, but her abrupt relocation undermined the stability of Darell's home environment and disrupted the stable home environment she created for Darell in Michigan. Thus, the trial court did not err in concluding that relocating Darell again was not in his best interests, given the emphasis placed on maintaining continuity. See MCL 722.23(d).

Plaintiff puts forth the same argument for factors (e) and (f), MCL 722.23(e) and MCL 722.23(f), specifically, that the trial court erred by failing to consider defendant's numerous failed relationships and dysfunctional family. MCL 722.23(e) instructs the trial court to evaluate the permanence of the family unit in the custodial home. MCL 722.23(f) requires the trial court to consider the "moral fitness of the parties involved. The trial court found that defendant's family unit and home was more stable, given that defendant lived in his home for six years. The trial court found that the parties were equally morally fit.

The trial court did not consider defendant's failed relationships in making its factual findings for factors (e) and (f). Plaintiff testified that defendant was married at least one other time and had a live-in girlfriend before she and defendant started their relationship. Nevertheless, the trial court need not comment on every matter in evidence or every argument raised by the parties. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005). The trial court also did not consider defendant's dysfunctional family; however, there was no evidence pertaining to that allegation. Plaintiff impermissibly expands the record on appeal by making factual assertions about defendant's relationships and family in her brief. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990); MCR 7.210(A).

MCL 722.23(h) focuses on the home, school and community record of the child. The trial court found that the parties are equally aware of Darell's need and attend to him accordingly. Plaintiff argues that the trial court should have found in her favor on this factor because defendant did not believe Darell was autistic; he was never involved in Darell's extracurricular activities, and Darell's academic performance has declined since he has lived with defendant. Defendant admitted that he had reservations about Darell's autism. Nonetheless, since he gained custody of Darell, he had Darell evaluated by the Southfield Public Schools special education department; he met with the school counselors, and he and his wife have taken an active interest in Darell's schoolwork. It appears that, given the opportunity, defendant is willing and able to cater to Darell's special needs. Therefore, the evidence supports the trial court's factual findings, and plaintiff has failed to meet her burden of showing that the findings are against the great weight of the evidence

Regarding factor (i), MCL 722,23(i), the reasonable preference of the child, the trial court met with Darell and decided that he was not of sufficient age to express a preference. Plaintiff argues that the trial court should have used a non-traditional method to ascertain Darell's preference. Plaintiff did not identify the non-traditional method she thinks the trial court should have used, nor did she cite any authority to support her assertion that the trial court was required to use non-traditional methods to determine Darell's preference. We note that a child's preference does not automatically outweigh the other factors, but is only one element evaluated to determine the best interests of the child, *Treutle v Treutle*, 197 Mich App 690, 694-695; 495

NW2d 836 (1992), and the trial court is only required to consider the child's preference if it finds the child to be of sufficient age to express a preference, MCL 722.23(i). This Court has held that children over the age of six years are generally old enough to express a preference. *Bowers v Bowers*, 190 Mich App 51, 55-56; 475 NW2d 394 (1991). However, at the evidentiary hearing, Darell was five years old, and his communications skills were underdeveloped because of his autism. From the record, it is evident that Darell was unable to express a preference; until recently, he could not form sentences on his own and only echoed what he heard others say. The trial court, therefore, did not err when it found Darell was not of sufficient age to express a preference.

Plaintiff next argues that the trial court erred when it found the parties equal for factor (j), MCL 722.23(j), which concerns the willingness and ability to foster a parent-child relationship with the other party. The trial court found that the parties were equal on this factor. Plaintiff argues that she always tried to include defendant in every aspect of Darell's life and contends that the trial court should have found that this factor favored her. Plaintiff testified that she attempted to include defendant in Darell's life, but on numerous occasions was rebuffed. However, defendant testified that plaintiff never gave him basic information about Darell, like what school he attended or who was his pediatrician. Nonetheless, defendant indicated that he wanted plaintiff to have a generous amount of parenting time if he was awarded custody. Because the evidence shows that the parties are both willing and able to foster a parent-child relationship between Darell and the other party, the trial court's finding that the parties are equal for this factor is not against the great weight of the evidence.

Plaintiff's final argument on appeal is that the trial court and the FOC evaluator were biased against her for leaving the state with Darell before the evidentiary hearing. There is no support in the record for defendant's suggestion that the trial court and the FOC evaluator were biased against her. A trial court is charged with the responsibility of determining the credibility of witnesses, and judicial remarks that are critical, disapproving of, or even hostile toward parties or their cases ordinarily do not establish bias. *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996). Here, the trial court and the FOC evaluator noted that plaintiff moved to Maryland with Darell without the court's permission, but, neither the trial court nor the FOC evaluator made critical, disapproving or hostile remarks toward or about plaintiff. Plaintiff has not overcome the heavy presumption of judicial impartially. *Id.* at 497.

We affirm.

/s/ Deborah A. Servitto
/s/ Joel P. Hoekstra
/s/ Jane E. Markey